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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRANDALYN PURSLEY et al., Plaintiffs and Appellants, v. AMY LEE PHILIPPE et al., Defendants and Appellants.	B209435 (Los Angeles County Super. Ct. No. MC015988)

APPEALS from an order, a judgment and two postjudgment orders. Victor E. Chavez, Judge. The order, judgment, and postjudgment order denying a motion for new trial and motion to set aside the verdict are affirmed. The postjudgment order awarding costs is affirmed in part, reversed in part and remanded with directions.

R. Rex Parris Law Firm, Stephen K. McElroy and Jason P. Fowler for Plaintiffs and Appellants Brandalyn Pursley and Shawn Holzberger.

Hanger, Steinberg, Shapiro & Ash, John A. Demarest and Benson Y.L. Chan for Defendants and Appellants Amy Lee Philippe, Gerald Henry, Helen Henry and H.D.A.E., Inc.

Brandalyn Pursley and her husband, Shawn Holzberger, appeal from the judgment entered after a jury awarded $835,369 to Pursley and $25,000 to Holzberger in their lawsuit for personal injuries against Amy Lee Philippe, Gerald Henry, Helen Henry and H.D.A.E., Inc. (collectively Henry defendants). Pursley and Holzberger (collectively the Holzbergers)[1] contend the trial court erred in denying their motion to recover prejudgment interest and expert witness costs incurred after the Henry defendants failed to accept their offers to compromise pursuant to Code of Civil Procedure section 998.[2]

The Henry defendants appeal from the trial court's order denying their motion to disqualify Pursley's trial counsel. They also appeal from the judgment and certain postjudgment orders, contending the court erred in denying their motions to set aside the judgment and for a new trial based on excessive damages and denying in part their motion to tax costs.[3]

We reverse the postjudgment order denying in part the Henry defendants' motion to tax costs to the extent it appears to award costs that are not authorized and remand to the trial court to consider that question in the first instance. In all other respects, the judgment (including the order denying the motion to disqualify Pursley's counsel) and the postjudgment orders are affirmed.

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1 After this action was filed, Pursley and Holzberger married; and Pursley changed her surname to Holzberger. In this opinion, we refer to Pursley individually as Pursley, the name used in the complaint, but refer to Pursley and Holzberger collectively, when necessary, as the Holzbergers.

2 Statutory references are to the Code of Civil Procedure unless otherwise indicated.

3 The Henry defendants filed separate notices of appeal from the court's order denying their motion to disqualify Pursley's counsel (see *Meehand v. Hopps* (1955) 45 Cal.2d 213, 217 [order denying motion for disqualification of counsel is appealable order]; *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1263-1264 [same]) and from the judgment and the trial court's postjudgment orders. The Holzbergers filed their own notice of appeal. All appeals were consolidated by our order of March 23, 2009.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Accident*

On July 31, 2003 Philippe was driving a Toyota pick-up truck in the course and scope of her employment with H.D.A.E, Inc., a business owned and operated by Gerald and Helen Henry. The truck itself, however, was registered to the Henrys, not the business.

As she was making a left-hand turn, Philippe hit the back of Pursley's car. Pursley was driving; Holzberger was riding in the front passenger seat. Pursley injured her left elbow in the accident, requiring surgery. Holzberger injured his head. Pursley claimed, as a result of the accident, she developed reflex sympathetic dystrophy (RSD) in her elbow, also known as complex regional pain syndrome, a painful condition of the sympathetic nervous system.

2. *The Holzbergers' Lawsuit and Offers to Compromise*

Pursley and Holzberger sued the Henry defendants for negligence.[4] The complaint alleged Philippe was the agent of H.D.A.E., Inc. and of the Henrys when she negligently caused the accident.

On November 3, 2006 Pursley served each of the four Henry defendants with an offer to compromise pursuant to section 998 offering to settle her action against that defendant "and no other" by entry of a judgment for $399,999.99, with the judgment "offset by any amounts paid by any other joint tortfeasor." Each of Pursley's offers was identical but for the name of the defendant to which it was directed.[5]

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4 The initial complaint, filed in October 2004, named only Philippe, Gerald Henry and Helen Henry. The complaint was amended in May 2005 to add H.D.A.E., Inc. as a defendant.

5 For example, as to Gerald Henry, Pursley's section 998 offer read, "Pursley offers to have judgment taken against defendant Gerald Henry for himself and no others in the above-entitled action pursuant to Section 998 of Code of Civil Procedure for the sum of . . . $399,999.99, each party to bear their own costs and attorney fees. Said judgment to be offset by any amounts paid by any other joint tortfeasor in this action."

Like Pursley, Holzberger also served each of the four defendants with an offer to compromise his claims. Holzberger's offers to compromise, directed to each of the Henry defendants for "himself or herself and no other," used the identical language as Pursley's. Only the dollar amount—$9,999.99—was different. None of the Henry defendants responded to either Pursley's or Holzberger's offer to compromise.

3. *The Henry Defendants' Motion To Disqualify Pursley's Counsel*

On July 7, 2008, the first day of trial, counsel for the Henry defendants discovered that Gerald Reiche, an employee of the Henry defendants' insurance carrier, Allstate Insurance Company, had accepted a job offer (although he had not yet started) to work as a case manager at the law firm of Pursley's counsel, the R. Rex Parris Law Firm. The Henry defendants immediately moved to disqualify Pursley's counsel on the ground Reiche had been the insurance adjuster working on the Henry defendants' case since 2006 and, as such, had been privy to confidential lawyer-client communications, as well as material protected by the attorney work product doctrine.

Pursley opposed the motion. With her opposition papers, Pursley submitted a declaration from Robert A. Parris, an attorney at her trial counsel's firm, explaining that Reiche had expressed interest in becoming a case manager at the law firm in June 2008. Robert Parris, who was not working on Pursley's case, interviewed Reiche that month. At no time during his interview did Reiche have any contact with the attorneys working on Pursley's lawsuit, nor did he disclose any information about the case. All conversations were limited to Reiche's qualifications and the duties and employment benefits of the new position. Reiche was told, as an employee of the R. Rex Parris Law Firm, he would be screened from Allstate-related cases as to which he had a possible conflict. Allstate did not object to Reiche's new employment. Reiche was not scheduled to begin his employment with the R. Rex Parris Law Firm until August 2008, well after the trial in the instant case was scheduled to (and did) conclude.

The trial court denied the motion, ruling Pursley's counsel had rebutted any presumption that confidential information had been communicated by Reiche to the R. Rex Parris Law Firm.

4. *The Trial and Jury Verdict*

The Henry defendants conceded liability at the beginning of trial, and the case proceeded to the jury solely on the questions of causation and damages. The jury, in a special verdict, awarded Pursley $85,369 in past economic damages and $750,000 for past noneconomic damages, including physical pain and mental suffering. The jury awarded Pursley nothing for future economic damages and nothing for future noneconomic damages, including physical pain and mental suffering. The jury awarded Holzberger $25,000 for past noneconomic damages, including physical pain and mental suffering. (The special verdict form did not request the jury to determine past economic damages or any future damages for Holzberger.) No apportionment of liability among the various defendants was requested in the verdict form; none was made by the jury.

5. *Postverdict and Postjudgment Motions*

On September 10, 2008 Pursley filed a memorandum of costs seeking $329,265.19, including prejudgment interest and expert witness fees. The Henry defendants moved to tax costs, contending an award of prejudgment interest and expert witness fees was not unauthorized because the section 998 offers were invalid; they also challenged other cost items, including deposition costs, travel expenses and costs of models and exhibits used at trial.

Judgment was entered on October 9, 2008. After taking the matter under submission, on November 14, 2008 the trial court granted in part and denied in part the motion to tax costs and awarded Pursley costs in the amount of $103,627.82. The court agreed with the Henry defendants that prejudgment interest and expert witness fees were not recoverable pursuant to section 998 and Civil Code section 3291 because the section 998 offers were not sufficiently clear to provide notice to the defendants as to the amounts to be paid to settle the entire action. The court also disallowed certain other items, including attorney travels costs unrelated to depositions.

On November 3, 2008 Gerald and Helen Henry moved for a new trial (§ 657) and to vacate the judgment (§ 663). The Henrys asserted, as owners of the truck Philippe was driving, their liability in the action was limited to $15,000 (to each plaintiff) pursuant to

Vehicle Code section 17151 and argued the Holzbergers had failed to present any evidence that Vehicle Code section 17151 did not apply in this case. All the Henry defendants moved for a new trial on the ground the noneconomic damages awarded to Pursley were excessive. On December 4, 2008 the trial court denied the motions.

CONTENTIONS

Pursley and Holzberger contend the trial court erred in concluding their offers to compromise under section 998 were not sufficiently clear and unambiguous to justify an award of prejudgment interest and expert witness costs. Gerald and Helen Henry contend, as registered owners of the truck Philippe was driving when it collided with the Holzbergers' car, their liability was limited by Vehicle Code section 17151 to $30,000. All Henry defendants contend the trial court erred in denying their motion to disqualify the Holzbergers' trial counsel and their motion for a new trial based on the jury's award of excessive noneconomic damages to Pursley, as well as in denying in part their motion to tax costs.

DISCUSSION

Pursley's and Holzberger's Appeal

1. *The Trial Court Did Not Err in Denying Prejudgment Interest and Expert Witness Costs*

a. *Governing law and standard of review*

Section 998, subdivision (d), provides, "If an offer [to compromise] made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award . . . the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs." Section 998's cost-shifting provisions are intended to encourage settlement by providing "a strong financial disincentive to the party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer." (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th

797, 804; accord, *Phelps v. Stostad* (1997) 16 Cal.4th 23, 29, fn. 3; *Berg v. Darden* (2004) 120 Cal.App.4th 721, 726.) If not accepted before trial, or within 30 days after it is made, the section 998 offer is deemed withdrawn. (§ 998, subd. (b)(2).)

Civil Code section 3291 provides, "In any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person . . . it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section. [¶] If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of the judgment." (See *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 657.)

The party seeking to invoke section 998's cost-shifting provisions and Civil Code section 3291's authorization for prejudgment interest has the burden of demonstrating the section 998 offer complied with the statute, that is, the offer clearly and unambiguously stated the terms and conditions of the proposed compromise judgment and included a provision allowing the accepting party to indicate acceptance of the offer by signing a statement to that effect. (§ 998, subd. (b); see *Berg v. Darden, supra,* 120 Cal.App.4th at pp. 727, 731-732 ["the offer must be sufficiently specific to permit the recipient meaningfully to evaluate it and make a reasoned decision whether to accept it, or reject it and bear the risk he may have to shoulder his opponent's litigation costs and expenses"; it "need not contain any 'magic language,' so long as it is clear the offer, which must be written, is made under section 998 and, if accepted, will result in the entry of judgment or alternative final disposition of the action legally equivalent to a judgment"]; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799; *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 585.) The offer is to be strictly construed in favor of the party

sought to be subjected to it. (*Barella*, at p. 799; *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 732-733.)

The trial court's determination whether the section 998 offer complies with the statute is subject to de novo review. (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130; *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 329.) The trial court's findings as to the reasonableness of the offer are reviewed for abuse of discretion. (*Mesa Forest Products, Inc.*, at p. 329.)

b. *Pursley's and Holzberger's section 998 offers were ambiguous and, therefore, invalid*

Pursley contends she is entitled to prejudgment interest as well as expert witness costs incurred after her section 998 offers because none of the Henry defendants obtained a judgment more favorable than the settlement offer. As Pursley explains it, although she offered to have judgment taken against each one of the Henry defendants in the amount of $399,999.99, because of the offset provision in the offers, it was clear that acceptance by any one of the defendants would have "concluded [her] case in its entirety for a single payment of $399,999.99." Since she obtained a judgment of $835,369, enforceable jointly and severally against each defendant, Pursley insists her judgment against each defendant was more favorable to her than the demand directed to that defendant.

Holzberger, who received a $25,000 judgment against each defendant jointly and severally, advances a similar argument for the recovery of prejudgment interest.

Despite Pursley's current characterization of her section 998 offers, when the offers were sent to the Henry defendants, her intent to settle all her claims against all the defendants for a single payment of $399,999.99 was far from clear. Each offer to settle for $399,999.99 was directed to a specific defendant "and no other," suggesting that dismissal of the case against all defendants could only be accomplished by an aggregate payment of nearly $1.6 million. Moreover, the purportedly "clarifying language" regarding offsets based on the amounts paid by any joint tortfeasor, while contained in the section 998 offers themselves, was omitted from the letters of acceptance included with the offers. Indeed, had each defendant accepted the offer and filed the letters of

acceptance with the court, it would have appeared a stipulated judgment had been reached for nearly $1.6 million. This defect is fatal to the Holzbergers' claim for expert fees and prejudgment interest.

In an effort to salvage her claims—and minimize the ambiguity created by the omission of critical language from the acceptance letters provided with the offers—Pursley contends, as a practical matter, she could not have written her offer differently. As Pursley notes, section 998 offers must clearly apportion among each defendant in a multiple-defendant case the amount demanded from a particular defendant. (See, e.g., *Taing v. Johnson Scaffolding Co.*, *supra*, 9 Cal.App.4th at p. 586 [to be effective, an offer to multiple parties under § 998 must be explicitly apportioned among the parties to whom the offer is made so that each offeree may accept or reject the offer individually].) In light of that requirement, Pursley argues, she had to direct her offer to each specific defendant "for himself or herself and no other," while at the same time making clear the judgment would be reduced by any amount paid by a joint tortfeasor.

Whatever practical difficulties a plaintiff may encounter in other cases involving multiple defendants, Pursley here plainly had a simple and direct way to accomplish her claimed purpose: She could have made an unapportioned offer to the Henry defendants collectively to settle the entire action for $399,999.99 since her claims against H.D.A.E., Inc. and Gerald and Helen Henry were based solely on their vicarious liability for Philippe's negligence. (See, e.g., *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1549 [ordinarily, when plaintiff issues § 998 offer to several defendants, the offer must separately allocate the portion of the judgment applicable to each defendant; when as here, however, defendants are sued on a theory of joint and several liability, offer need not be apportioned because each defendant is potentially liable for the full amount of any judgment]; see also *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [where employer was jointly liable on a respondeat superior or vicarious liability theory for the full amount of damages on every cause of action in which it was named as a defendant, single, unapportioned settlement offer valid], disapproved on another ground in *Lakin v. Watkins*

Associated Industries, supra, 6 Cal.4th at p. 664.) The same, of course, is true for Holzberger.

Strictly construing the language of the section 998 offers against Pursley and Holzberger, as we must (see *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1170), we agree with the trial court the offers were not sufficiently clear to fully and unambiguously apprise the Henry defendants of the conditions for settlement of the action and were, therefore, invalid as a matter of law. The court properly denied the request for prejudgment interest and expert witness fees.

The Henry Defendants' Appeals

2. *The Henry Defendants Have Not Demonstrated the Court Committed Reversible Error in Denying Their Motion To Disqualify Pursley's Counsel*

a. *Principles governing attorney disqualification motions*

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.'" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*SpeeDee Oil*); accord, *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 (*City and County of San Francisco*); *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 791-792 (*Kirk*).) A disqualification motion implicates several important interests, including the client's right to chosen counsel, an attorney's responsibility to represent a client, the financial burden on a client required to replace disqualified counsel and the possibility that tactical considerations, rather than concerns about protecting confidential information or maintaining loyalty, are motivating the moving parties. (*SpeeDee Oil*, at pp. 1144-1145.) Accordingly, attorney disqualification motions "must be examined carefully to ensure that literalism does not deny the parties substantial justice." (*Id.* at p. 1144.)

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citation.] If the trial court resolved disputed factual issues, the

reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's [exercise of its discretion] as a question of law" in light of the pertinent legal principles. (*SpeeDee Oil, supra*, 20 Cal.4th at pp. 1143-1144.)

b. *The trial court did not abuse its discretion in denying the motion to disqualify Pursley's counsel and his law firm*

The Henry defendants contend the trial court erred in denying their motion to disqualify Pursley's trial counsel and his law firm after the firm extended an eve-of-trial offer of employment to Reiche, an insurance adjuster for the Henry defendants' insurer. Before the offer was made, Reiche had worked for several years on matters involving the accident.

Although he is not an active member of the State Bar of California and was not employed as a lawyer by the insurance company, the Henry defendants emphasize that Reiche has a law degree and has passed the California bar examination and argue the situation is comparable to one in which a lawyer representing the defendant in a lawsuit moves to the law firm representing the plaintiff in the same action. In such a case, they assert, the lawyer's disqualification is mandatory. (See *City and County of San Francisco, supra,* 38 Cal.4th at p. 846 ["An attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation will be automatically disqualified. [Citation.] Moreover, an attorney may not switch sides during pending litigation representing first one side and then the other. [Citations.] That is true because the duty to preserve client confidences [citation] survives the termination of the attorney's representation."]; see also *ibid.* [the "enduring duty to preserve client confidences" is embodied in rule 3-310 of Rules of Prof. Conduct].) The argument is severely flawed.

Contrary to the Henry defendants' suggestion, Reiche, regardless of his law degree, had no attorney-client relationship with the Henry defendants (or with his employer, Allstate, for that matter). Accordingly, the per se disqualification rule for counsel switching sides in violation of rule 3-310 of the Rules of Professional Conduct[6] does not apply. (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 465 [rule 3-310 of Prof. Rules of Conduct "is inapplicable" absent attorney-client relationship]; *In re Lee G.* (1991) 1 Cal.App.4th 17, 27 [same].)[7]

Instead, Reiche's situation is closely analogous to that of a nonlawyer employee who leaves one law firm for a position at an opposing law firm in the same litigation. As the court recognized in *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, such a change in employment creates a heightened risk a client's confidences may be compromised, "whether from base motives, an excess of zeal, or simple inadvertence." (*Id.* at p. 588.) Nonetheless, "[h]iring a former employee of an opposing counsel is not, in and of itself, sufficient to warrant disqualification of an attorney or law firm." (*Id.* at p. 592.) Rather, if the former employee possesses confidential attorney-client information materially related to pending litigation, the rights of all parties are

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6 Rule 3-310(C) of the Rules of Professional Conduct provides, "A member shall not, without the informed written consent of each client . . . [¶] [a]ccept or continue representation of more than one client in a matter in which the interests of the clients actually conflict." Rule 3-310(E) provides, "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

7 Although we need not reach the issue because Reiche was not functioning as a lawyer in this matter, our colleagues in Division Three of this court recently held automatic vicarious disqualification of a law firm is not necessarily required when a lawyer who has represented one party in litigation moves to a law firm representing an adverse party: "We do not doubt that vicarious disqualification is the *general rule* and that we should presume knowledge is imputed to all members of a tainted attorney's law firm. However, we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case." (*Kirk, supra,* 183 Cal.App.4th at p. 801.)

appropriately protected by applying a rebuttable presumption of imputed knowledge. (*Id.* at p. 596.)

Utilizing this approach, as explained in *In re Complex Asbestos Litigation*, *supra*, 232 Cal.App.3d 572, once the party seeking disqualification shows that the former employee of its lawyer or law firm possesses confidential attorney-client information materially related to the litigation,[8] a rebuttable presumption arises that the information has been used or disclosed in the current employment. "The presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff. [Citation.] To rebut the presumption the challenged attorney [law firm] has the burden of showing that the practical effect of formal screening has been achieved. The showing must satisfy the trial court that the employee has not had and will not have any involvement with the litigation, or any communication with the attorneys or coemployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed. If the challenged attorney fails to make this showing, then the court may disqualify the attorney and law firm." (*Id.* at p. 596; see *Kirk, supra,* 183 Cal.App.4th at pp. 806-807 ["presumption of imputed knowledge is rebuttable, not conclusive"; if no confidential information is shared and tainted attorney can be effectively screened from case, there is no reason to disqualify firm].)

Here, the trial court, after hearing testimony, found the presumption of a transfer of confidential information from Reiche to the R. Rex Parris Law Firm had been fully rebutted by undisputed evidence that Reiche had not yet begun his employment with the firm and that effective screening had been implemented at the inception of the employment interview: Reiche was not asked about, and had not spoken to anyone at the firm about, the Pursley litigation during his employment interviews; in addition, he was

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8 The court in *In re Complex Asbestos Litigation, supra,* 232 Cal.App.3d at page 596, cautioned that the party seeking disqualification should not be required to disclose the actual information, but should describe "the nature of the information and its material relationship to the proceeding."

informed he would be screened from that case and all of the litigation involving cases in which he had participated while working for Allstate. (See *In re Complex Asbestos Litigation, supra*, 232 Cal.App.3d at pp. 593-594 [to rebut the presumption, there should be evidence that screening had begun at the inception of the employment interview to prevent disclosure of confidences and that, once hired, the tainted individual was precluded from any involvement in or communication about the challenged representation].) The trial court credited this testimony. Based on the record presented to us, the trial court was well within its discretion in denying the disqualification motion.[9]

c. *The Henry defendants failed to demonstrate the court's denial of their motion to disqualify Pursley's counsel was prejudicial*

Even if denial of their disqualification motion were error, the Henry defendants do not argue the error was prejudicial. This omission defeats their claim. (See *People v. Vasquez* (2006) 39 Cal.4th 47, 68-69 [when review of motion denying attorney disqualification motion is sought by appeal rather than by writ, appellant must demonstrate denial of motion was prejudicial]; see also Cal. Const., art. VI, § 13 [no judgment shall be set aside because of an error in procedure unless reviewing court concludes error has resulted in miscarriage of justice]; *Ketchum v. Moses* (2001) 24

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9 Because it was undisputed Reiche remained employed by Allstate at the time of trial, it is not entirely clear that the Henry defendants should have been given the benefit of the presumption of imputed knowledge in the first place. As the court explained in *Collins v. State of California* (2004) 121 Cal.App.4th 1112, a case involving an expert who had been retained by the defense as a consultant and then later retained by the plaintiff who was ignorant of the defense's retention of the same person, the theory of a rebuttable presumption of shared confidential information is a "'"a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff."'" (*Id.* at p. 1129.) "When the expert has gone to the other side and is no longer available to the side that originally retained him, the shifting of the burden of proof makes eminent sense. [¶] Here, however, [when the expert] . . . remained a consultant" for the defense, the "reason for shifting the burden of proof to the opposing party does not exist." (*Ibid.*) In such a case, the "most important source" for determining what information was relayed to opposing counsel remained in defendant's hands. (*Ibid.*) We need not address this question, however, because, even giving the Henry defendants the benefit of the evidentiary presumption, the trial court was justified in finding Pursley had conclusively rebutted the presumption.

Cal.4th 1122, 1140-1141 [appellant bears burden of overcoming presumption judgment is correct by affirmatively demonstrating reversible error; *Forrest v. Dept. of Corporations* (2007) 150 Cal.App.4th 183, 194 [same].)

4. *The Trial Court Did Not Err in Denying the Henry Defendants' Motions To Vacate the Judgment and for New Trial*

The Henry defendants' motions for new trial (§ 657) and to vacate the judgment (§ 663) both argued the jury's finding that Gerald and Helen Henry are vicariously liable for the full amount of the judgment is incorrect as a matter of law and not supported by the evidence.[10] All Henry defendants also asserted in their new trial motion the award of past noneconomic damages to Pursley was excessive as a matter of law.

a. *The verdict does not violate Vehicle Code section 17151*

Vehicle Code section 17151, subdivision (a), limits the liability of the owner of a vehicle to $15,000 for the death of, or injury to, one person in any one accident ($30,000 for an injury to two or more persons) unless the driver was acting as an agent of the

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10 Section 657 provides, "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 5. Excessive or inadequate damages; [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law; [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application."

Generally, we review the trial court's denial of a new trial motion for abuse of discretion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176.) However, when the denial relies on the resolution of a question of law, we examine the matter de novo. (*Aguilar*, at p. 860; *Wall Street Network, Ltd.*, at p. 1176.)

Section 663 provides, "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered" if "there is an incorrect legal basis for the decision," not consisted with or supported by the facts or the judgment. Appellate review of a denial of a section 663 motion is limited to "a determination of whether the conclusions of law and judgment are consistent with and supported by the findings of fact." (*Newbury v. Civil Service Commission* (1940) 42 Cal.App.2d 258, 259.)

vehicle's owner when the accident occurred.[11] Gerald and Helen Henry contend this statute limits their collective liability to $30,000.

The Henrys acknowledge the evidence at trial established that Philippe was acting in the course and scope of her employment with H.D.A.E., Inc. at the time of the accident and that H.D.A.E., Inc. was properly found jointly and severally liable for Philippe's negligence under a theory of respondeat superior. (See *Hinman v. Westinghouse Electric. Co.* (1970) 2 Cal.3d 956, 960-961; *Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 468.) Nonetheless, they contend there was no evidence Philippe was acting as *their* agent when the accident occurred. (See Veh. Code, § 17151, subd. (a) [if driver not acting as owner's agent at time of accident, owner's liability limited under Veh. Code]; cf. *Pecccolo v. City of Los Angeles* (1937) 8 Cal.2d 532, 536 [if driver not operating vehicle in course and scope of employment, employer not liable under respondeat superior theory; accordingly, employer, as the vehicle's registered owner, has a limited liability in accordance with statutory amount provided in Veh. Code].)

At the threshold, nothing in the record on appeal supports the Henrys' assertion they raised this issue before or during trial. Vehicle Code section 17151 was not mentioned at trial by any party. The Henry defendants did not introduce any evidence, request jury instructions or object to the special verdict form before it was given to the jury on the ground it failed to make inquiries pertinent to that statute. Thus, to the extent the jury's failure to consider the factual predicates for the applicability of Vehicle Code section 17151 was error, it was either invited (see *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1312 [doctrine of invited error is an application of estoppel principles;

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11 Vehicle Code section 17151, subdivision (a), provides, "The liability of an owner, bailee of an owner, or personal representative of a decedent imposed by this chapter and not arising through the relationship of principal and agent or master and servant is limited to the amount of fifteen thousand dollars ($15,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of thirty thousand dollars ($30,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars ($5,000) for damage to property of others in any one accident."

"'"[w]here a party by his conduct induces the commission of error, he is stopped from asserting it as a ground for reversal" on appeal'"]); or the issue has been forfeited (see, e.g., *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2 [failure to object to verdict form before jury is discharged results in forfeiture unless record indicates complaining party's silence not motivated by desire to reap technical advantage]; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131 [same]).[12]

More fundamentally, as all parties agree, Vehicle Code section 17151 does not apply if the driver of the vehicle was acting as the agent of the registered owner at the time the accident occurred. The Henrys contend there was no evidence Philippe was acting as their agent. However, as the Henry defendants acknowledge, there was evidence Philippe was driving the car with the Henrys' permission. That evidence creates an inference of agency. (See *Squires v. Riffe* (1931) 211 Cal. 370, 373 ["The evidence shows without conflict that the automobile in question was owned by the appellant and was, at the time of the accident, being driven by Tallman with [the owner's] consent. From these facts an inference arises that he was her agent in driving the automobile. [Citation.] In addition to this inference, the foregoing evidence tends to show . . . not only that Tallman was operating the automobile with the appellant's consent, 'but that in doing so he was engaged in doing things which were matters of her . . . concern.' While such proof of agency is not conclusive, it is sufficient" to establish agency].) Accordingly, it was the Henrys' obligation, as the parties seeking to benefit from Vehicle Code section 17151's limitation of liability, to rebut that inference with evidence Philippe was not acting as their agent at the time of the accident. (See

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12 Although the Henrys insist they raised the issue during trial—both in a letter to counsel confirming the Henrys' qualified admission of liability (not filed with the court) and in a conference in the trial judge's chambers—there is nothing in the record to support that assertion. The record on appeal reflects the Henrys only raised the issue after the jury had returned its special verdict. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [appellant court cannot evaluate contentions absent a complete record or settled statement; party challenging judgment has burden to show reversible error].)

Montanya v. Brown (1939) 31 Cal.App.2d 642, 645-646 ["[i]t is true that from the facts of ownership and permissive use an inference of agency may be drawn [citations], which if uncontradicted by substantial evidence remains as evidence in the case" and will support a judgment in excess of the statutory limitation set forth in Veh. Code, § 17151].) They failed to do so. Any evidentiary failure concerning the question of agency (and thus the applicability of Vehicle Code section 17151) was the Henrys', not the Holzbergers'. The trial court did not err in denying the motions on the ground the verdict did not violate Vehicle Code section 17151.

b. *The trial court did not err in denying the Henry defendants' new trial motion on the ground the award of past noneconomic damages to Pursley was excessive*

The standard of review on a claim of excessive damages is well settled: "The amount of damages is a fact question, committed first to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. [Citations.] All presumptions favor the trial court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule. [Citations.] [¶] We must uphold an award of damages whenever possible [citation] and 'can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' [Citations.] [¶] In assessing a claim that the jury's award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor." (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078; see also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64 [damages are excessive """where recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice"""]; *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 414

[trial court's determination on motion for new trial on the issue of excessive damages is usually upheld].)

The Henry defendants contend the $750,000 award for Pursley's past noneconomic damages is excessive, given that the jury evidently disbelieved, to a substantial extent, Pursley's claim of continuing chronic pain and disability and therefore awarded her nothing in future economic and noneconomic damages. Notwithstanding the jury's apparent lack of regard for evidence that Pursley's RSD was permanent and disabling, there was substantial evidence that Pursley suffered great emotional and physical distress for several years due to the trauma and injuries she sustained in the accident. According to the evidence at trial, Pursley suffered an injury to the ulnar nerve in her elbow, resulting in pain and numbness and requiring her to undergo major surgery. After the surgery, Pursley continued to suffer nerve pain. To help ameliorate the pain, she underwent five nerve blocks in her neck and more than 12 ganglion blocks, which her treating and expert physician testified were very painful and carried substantial risks and side-effects. There was also evidence Pursley suffered from depression following the accident due to the injury and on-going pain and was unable to fully care for her infant daughter. To be sure, there was also testimony, including videotape of Pursley with her daughter, that, reasonably interpreted, cast some doubt on Pursley's claims of on-going disability and no doubt contributed to the jury's decision to award no future damages. Nonetheless, the jury evaluated all of the evidence and awarded her $750,000 in past noneconomic damages. The trial court, which was in the best position to assess the award, concluded it was not excessive. In light of the evidence at trial, that decision was proper.

5. *Remand to the Trial Court Is Necessary To Determine Whether All Costs Awarded to Pursley Were Authorized*

As the prevailing parties in the lawsuit, Pursley and Holzberger were entitled to an award of authorized costs. (§ 1032, subd. (b).)[13] Section 1033.5, subdivision (a),

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13 The memorandum of costs appears to seek recovery of costs on behalf of Pursley with Holzberger only requesting an award of prejudgment interest.

identifies certain items allowable as costs under section 1032. Section 1033.5, subdivision (b), specifies certain items that are not allowable as costs, "except when expressly authorized by law." If a specific cost item is not listed in section 1033.5, subdivisions (a) or (b), "it may be awarded in the trial court's discretion under section 1033.5, subdivision (c)(4), provided it satisfies the further requirement of section 1033.5, subdivision (c)(2), that it was reasonably necessary to the conduct of the litigation." (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1558.)

The question whether a cost item is authorized is one of statutory interpretation subject to de novo review. (*Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 389-390.) If authorized, the burden is on the party seeking to tax costs to demonstrate they were not reasonable or necessary. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) The trial court's determination that a cost item was reasonably necessary to the litigation is reviewed for abuse of discretion. (*Ibid*.; *Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39.)

a. *Deposition-related expenses*

Section 1033.5, subdivision (a)(3), authorizes the award of costs to a prevailing party for the "[t]aking, video recording and transcribing necessary depositions including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions."

Pursley sought $41,825.81 in deposition costs. The court disallowed costs for fees charged by expert witness under *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 600-601 and awarded Pursley $30,600.81, the remainder of her claimed deposition costs.

The Henry defendants challenge $22,942.24 of the $30,600.81 awarded in deposition costs, claiming those costs related to nine depositions taken by the Henry defendants, who not only incurred the costs of the depositions, but also permitted Pursley to retain possession of the original transcripts. Pursley, for her part, contends, as she did in the trial court, that the costs sought were associated with obtaining certified copies of

the deposition transcripts, an authorized cost under section 1033.5, subdivision (a)(3). Pursley also supplied invoices and receipts to show payment for the certified copies of the transcripts.

The Henry defendants do not challenge Pursley's assertion, evidently credited by the trial court, that the costs for those depositions were incurred to obtain certified copies of transcripts. Instead, they argue that, having permitted the Pursley defendants to retain the original transcripts, those costs were neither reasonable nor necessary.

The Henry defendants made this argument below; Pursley responded that the copies were necessary in light of the court's orders to lodge original transcripts with the court; and the court agreed with Pursley. On this record, we cannot say the trial court's determination that such costs were both reasonable and necessary was an abuse of its broad discretion on these matters. (See *Ladas v. California State Auto. Assn., supra,* 19 Cal.App.4th at p. 774 [if items appearing in a cost bill appear to be proper charges, burden is on party seeking to tax costs to show they were neither reasonable nor necessary]; *Seever v. Copley Press, Inc., supra,* 141 Cal.App.4th at p. 1557.)

The Henry defendants also assert the court erred in awarding travel costs for Pursley's attorneys to attend depositions at an average rate of more than $.50 a mile, much more than the $.20 a mile they insist is allowed under section 1033.5. (See § 1033.5, subd. (a)(7) [authorized costs include "[o]rdinary witness fees pursuant to Section 68093 of the Government Code"]; Gov. Code, § 68093 ["[e]xcept as otherwise provided by law, witness' fees for each day's actual attendance, when legally required to attend a civil action or proceeding in the superior courts, are thirty-five dollars ($35) a day and mileage actually traveled, both ways, twenty cents ($.20) a mile"].)

Section 1033.5, subdivision (a)(7), applies only to "ordinary witness fees." There is no authority holding the mileage rate captured by section 1033.5, subdivision (a)(7)'s reference to Government Code section 68093 also limits travel costs incurred by counsel attending depositions. Indeed, as we suggested in *Seever v. Copley Press, Inc., supra,* 141 Cal.App.4th at page 1560, such an interpretation would be contrary to the explicit statutory language, which allows travel expenses to attend depositions subject to the

requirement they be "reasonable in amount." (§ 1033.5, subd. (c)(3); see *Seever*, at p. 1560 [upholding order awarding travel costs to counsel to attend depositions at a rate of $.37 per mile]; see also *People v. Toney* (2004) 32 Cal.4th 228, 232 [if statutory language is unambiguous "'we presume the Legislature meant what it said, and the plain meaning of the statute governs'"].)[14]

b. *Models, blowups and photocopies of exhibits*

The trial court awarded Pursley $13,669.97, the full amount Pursley had claimed for "models, blowups and photocopies of exhibits." (See § 1033.5, subd. (a)(12) [allowable costs include "[m]odels and blowups of exhibits and photocopies of exhibits" if "they were reasonably helpful to aid the trier of fact"].) The Henry defendants insist Pursley did not incur any costs for certain exhibits such as the "nucleus medical device," the Adams anatomical elbow exhibit, medical and scene animations and the RSD animation[15] because these were items her counsel had used over the years in other matters. In addition, they argue, Pursley did not adequately identify the trial exhibits for which she sought photocopying costs, hampering the Henry defendants' ability to determine whether the exhibits were actually used at trial and whether they were reasonably helpful to the jury. (See *Seever v. Copely Press, Inc., supra,* 141 Cal.App.4th at p. 1558 [costs for exhibits not used at trial not allowable under § 1033.5, subd. (a)(12)].)

Pursley's counsel provided a declaration and supplemental documentation, including invoices and payment records reflecting costs incurred in using the animation and demonstrative exhibits at this trial. Moreover, Pursley supplied supporting

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14 Pursley advises this court in her respondent's brief that, at the time the depositions took place, gasoline prices in California were at a "record high" of $4.00 per gallon. The Henry defendants limit their argument to whether the costs in excess of $.20 a mile were authorized and do not argue on appeal the costs incurred were neither reasonable nor necessary. Accordingly, we do not consider that question.

15 Pursley alleged she had incurred costs of $107.10 for the nucleus medical device exhibit, $130.64 for the Adams anatomical exhibit, $2,370.00 for the medical and scene animations and $8,250 for the RSD animation.

documentation detailing her costs for photocopying trial exhibits. The trial court considered all of this material and found the costs claimed were both reasonable and necessary. That determination was well within its discretion.

c. *Other costs*

Pursley sought other "discretionary costs" including, among other things, costs incurred for the retrieval and copying of medical records ($6,373.41), daily transcription of trial proceedings ($3,644), meals and lodging unrelated to depositions ($65,862.44) and itemized miscellaneous costs related to the litigation ($36,454.96). (See § 1033.5, subd. (c)(4) ["[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion"].)

The trial court awarded Pursley "other costs" in the amount of $46,259.62—far less than the $122,398.12 requested—citing section 1033.5, subdivisions (a)(9) and (b)(5) [transcripts of court proceedings ordered by court are authorized; transcripts of proceedings not ordered by court are not authorized], (b)(3) [postage, telephone and photocopying charges, except for exhibits are not authorized]; and *Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at p. 774 [meal expenses, fax expenses and attorney travel unrelated to depositions not statutorily authorized]) as authority for the substantially-reduced cost award.

The Henry defendants contend the costs should have been reduced to zero because items such as daily transcript preparation and attorney travel expenses unrelated to depositions are not recoverable as costs. The trial court agreed with the Henry defendants on this point and deducted the costs of attorney travel, lodging expenses and daily transcripts. Still, the trial court seems to have awarded approximately $36,000 in "miscellaneous costs" (listed on attachment 13, page 18 of the memorandum of costs) comprised largely of what appears to be unauthorized expenses, including mediation-related costs, trial consultant fees, creation of binders and trial technician costs. Because we cannot tell from the record provided how the court arrived at its $46,259.62 cost

award, we remand to the trial court to consider, in the first instance, which of those miscellaneous costs are authorized.[16]

DISPOSITION

The postjudgment order denying in part the motion to tax costs is reversed, and the matter is remanded for the limited purpose of allowing the trial court to determine whether the items identified as miscellaneous costs in attachment 13 to the memorandum of costs are recoverable. In all other respects, the judgment (inclusive of the pretrial order denying the motion to disqualify counsel and all postjudgment orders) is affirmed. Each party is to bear his, her and its own costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON J.

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16 In light of the amounts at issue, the parties would do well to consider resolving the matter themselves rather than incurring further costs in presenting it once again to the trial court.